U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 December 2006

BALCA Case No: **2005-INA-00135**
ETA Case No.: P2002-CA-09530510/VA

In the Matter of:

OMAR CONSTRUCTION,
Employer,

on behalf of

JUSTINO CERON,
Alien.

Appearances: Carlos Vellanoweth, Esquire
John Gerhart, Equire
Los Angeles, California
For the Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Employer, Omar Construction, filed an application on March 21, 2001 for alien employment certification for the position of Supervisor, Electrician. (AF 45). The Employer received the name of one U.S. applicant for the position. (AF 12-19). The Employer sent the applicant a letter requesting that he contact the Employer to verify his supervisory experience and to set up an appointment for an interview. (AF 11). The letter was sent certified, return receipt requested. The postal service attempted delivery with two notices, and the letter was returned to the Employer undelivered. (AF 9). The Employer noted no further actions to attempt to contact the applicant. (AF 9).

On September 8, 2004, the CO issued a Notice of Findings finding that the Employer had not made a good faith effort to recruit, which constituted an unlawful rejection of U.S. workers in violation of 20 C.F.R. § 656.21(b)(6). (AF 43a-43c). The CO found that the applicant appeared to be qualified on the face of his resume, and that the single unclaimed certified letter was insufficient to document good faith recruitment efforts. The Employer was advised that it could rebut the NOF with submission of documentation demonstrating that the U.S. applicant was recruited in good faith and rejected solely for lawful job-related reasons, which could include telephone bills to document the dates and times that calls were made. (AF 43a-43c).

The Employer submitted a rebuttal on September 28, 2004, in which it reiterated the fact that the U.S. applicant did not sign for the delivery of the certified letter, which was returned to

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

the Employer undelivered. The Employer further argued that "[u]pon a careful review of his resume," the U.S. applicant did not possess the requisite supervisory experience. (AF 38-40).

The CO issued a Final Determination denying certification on December 22, 2004, finding that the Employer remained in violation of 20 C.F.R. § 656.21(b)(6). The CO found that the Employer's rebuttal failed to show that the Employer attempted to contact the applicant by telephone or by any other means beyond the returned letter. The CO noted that the fact that the certified letter was returned to the Employer underscored the need for documentation to show that other attempts were made to contact the applicant. (AF 4-5).

The Employer submitted a request for review of the denial to the Board of Alien Labor Certification Appeals (Board) in accordance with 20 C.F.R. § 656.26. In the request for review, the Employer set forth new claims regarding its attempts to contact the applicant, including an assertion that the applicant's phone was disconnected at the time that it attempted to make contact with the applicant. (AF 1-3). These new factual assertions were reiterated by counsel in the Employer's Appeal Brief, in which the Employer maintains that it made reasonable attempts to contact the applicant.

DISCUSSION

The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (en banc). Under the controlling regulatory scheme, rebuttal following the NOF is the employer's last chance to make its case. *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Id.* Therefore, the additional claims by the Employer of its attempt to contact the U.S. applicant,

submitted with the Request for Review and the Appeal Brief, cannot be considered by the Board on appeal.[2]

Under the labor certification regulations, employer must be prepared to document good faith recruitment efforts, and rejection of any U.S. worker applicants only for lawful, job-related reasons, as required by 20 C.F.R. § 656.21(b)(6). In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc), the Board discussed how documentation of reasonable efforts to contact applicants may be necessary to establish good faith in recruitment:

> What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. … In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*).
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> Whether the mailing of [a certified] letter in and of itself constitutes a reasonable effort to contact qualified U.S. applicant depends on the facts of the case. It has been held that "Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. *Diana Mock*, [19]88-INA-255 (April 9, 1990)." *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). It has also been held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *see also Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998); *Therapy Connection*, 1993-INA-129 (June 30, 1994).

The Employer's rebuttal does not support the assertion that sufficient attempts were made to contact the applicant. Indeed, there is nothing in the record suggesting that the Employer made any further attempts to contact the applicant after it received the returned letter, other than the untimely argument made in the request for review and appellate brief that an additional attempt was made to contact the applicant.

[2] We also observe that the NOF expressly notified the Employer of the need to submit documentary evidence of any alternative recruitment efforts.

The CO did not address in the Final Determination the Employer's argument that the applicant was not qualified on the face of his resume because he did not have qualifying experience as a supervisor. The ETA 750A stated a requirement of two years of experience in the job offered, which is an Electrician Supervisor. (AF 45). The applicant's resume indicated that he had worked from 1991 to the date of the application in 2004 as an electrician. Most of that experience is shown as a Journeyman Wireman without mention of supervisory experience. However, from 1992 to 1997 the applicant had his own electrician service business. For this experience, the resume states that the applicant supervised crews and fabrications. (AF 16). In the rebuttal, the Employer argued that self-employment did not count as experience.

The Board held in *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc), that where a U.S. applicant's resume indicates that he meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he meets all of the Employer's stated actual requirements, the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements.

In the instant case, the applicant's resume indicates substantial experience as an electrician, several years of which appear to have involved supervisory experience in his own business. The applicant's resume, therefore, provided such a reasonable prospect that the applicant met the actual minimum requirements for the job, that the Employer could not be found to have properly rejected the applicant without at least making a good faith attempt to determine by interview, or other means, whether he was qualified. The Employer's argument that self-employment cannot be counted is not supported by citation to any legal authority, and we know of no such authority.

Consequently, we find that the Employer failed to provide lawful, job-related reasons for rejecting the U.S. worker’s application, and that the CO properly denied certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.